

SB 263 is a bill that would limit low water flows during the critical summer months for trout.

Critically de-watered streams and rivers are a highly relevant issue for the people that live, work and play in Montana. Montana possesses over 4,000 miles of streams that are either dry or have only minimal flow through much of the year due to water laws in the Western U.S. that allow property owners to take a certain amount of water from these water sources. In many cases, the rights to withdraw water exceed the total amount of water in the river or stream- particularly in late summer. These waterways are a significant economic resource for Montana. According to the Institute for Tourism and Recreation Research, in 2005 alone more than 600,000 visitor groups traveled to Montana for rafting- or fishing-related activities and guided fishing trips contributed more than \$51 million to the state economy.

Article 9 of Montana's constitution confirms the rights of every Montanan to the use of our surface waters. Article 9 also provides for the use of the waters of the state for it's people and to hunt and fish and describes our "harvest heritage" to harvest fish and game.

Montana as well as most other state in the U.S. have confirmed the concept of a public trust doctrine(Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984) (holding that the public has a right of recreational use of navigable waters flowing through privately owned land and citing the constitutional provision declaring state ownership of waters is burdened by the public trust).). Montana even went so far as to expand the trust purpose, expand the navigable-in-fact definition, and expand it to include all surface water and ground water. The public trust doctrine dates back as far as 528 A.D and the Roman emperor Justinian. This doctrine is applicable to Private Water Rights. The public trust doctrine applies to private water rights, meaning individual water rights that affect public trust resources are rights of use that a state can revoke if the private right harms those resources.

In Montana and much of the western U.S we use the concept of prior appropriation regarding waters rights. This legal system allocates water by permit according to the earliest date of use. The public trust doctrine underlies the exercise of every water right that withdraws or affects a public trust resource, regardless of the differences in state water law around the country.

Western prior appropriation water rights are defined by beneficial use, a term that has demonstrated great flexibility as water uses have evolved. Traditional beneficial uses were limited to domestic and economic uses but now include uses that reflect public trust values of stewardship, conservation, and sustainability. These modern beneficial uses include water for fish and wildlife preservation, in-stream flow protection and recreational use, groundwater recharge, wetlands restoration, and flow augmentation.

The public trust doctrine can play a particularly significant role in supporting state actions to protect trust resources as a defense against a Fifth Amendment takings claim for compensation by a private property owner. In the United States, two types of governmental takings affect individuals and, if found, require compensation: a physical taking and a regulatory taking. A physical taking occurs when the government physically displaces an individual from exclusive control of property. A regulatory taking occurs when government restrictions on property are tantamount to a physical invasion.

The common law public trust doctrine qualifies as a background principle based on its deep roots that predate the creation of many states. Where regulations that arise from public trust duties impact private land, states may assert this defense to end lawsuits. There is, in fact, no regulatory taking. The public trust doctrine trumps claims of an exclusive, private, and compensable water right. Any grant of water rights comes burdened with public interests in the water that are paramount to private interests. State legislators should have no fear of takings litigation as the state is protected.

The Public Trust Doctrine focuses on the rights of public use and ultimately public access to our rivers and streams. Please turn over page to view map of Montana Dewatered Streams.

2/8/2011
Stephen Hurts
Ballatin Wildlife Association

Snake River Watershed
Idaho Department of Water Resources

Chronic Dewatering
Periodic Dewatering

Scale: 0 25 50 75 100 miles

North Arrow


Map of the Snake River watershed in Idaho, showing the Snake River and its tributaries. The map is divided into two regions: Chronic Dewatering (indicated by a thick black line) and Periodic Dewatering (indicated by a thin black line). The map includes a scale bar (0 to 100 miles) and a north arrow. The map is titled "Snake River Watershed" and "Idaho Department of Water Resources".



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 **Lake**

 **Chronic Dewatering**

 **Periodic Dewatering**

